SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

PATRICK POGAN and JACQUELINE POGAN,
Plaintiffs,

- against -

NYU LANGONE MEDICAL CENTER, NYU HOSPITAL CENTER, and TURNER CONSTRUCTION CO.,
Defendants.

INDEX NO. 153887/2016
MOTION DATE 03/28/2018
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3; 4 - 6
Answering Affidavits — Exhibits	4 - 6; 7 - 9
Replying Affidavits	10; 11

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiffs' motion for summary judgment on liability on their Labor Law §240[1] claim pursuant to CPLR §3212, is denied. Defendants' cross-motion for summary judgment pursuant to CPLR §3212, is granted to the extent that Plaintiffs' Labor Law §241[6], §200 and common-law negligence claims are dismissed.

Plaintiff Patrick Pogan sustained injuries on April 28, 2016 when he fell off a sidewalk bridge. Mr. Pogan, a journeyman union ironworker, was employed by non-party Stonebridge, Inc. ("Stonebridge") for a construction project located at Defendant NYU Langone Medical Center Kimmel Pavilion at 424 East 34th Street, New York, New York ("Construction Project"). Prior to partaking in the Construction Project, Mr. Pogan completed a safety orientation program certifying he was aware of, among other safety protocols, the requirement to be "tied off above 6 [feet] from the ground or deck 100% of the time" with the body harness he was given (Opposition Papers Ex. G). Defendant Turner Construction Co. ("Turner") was the general contractor for the Construction Project who employed Stonebridge as a sub-contractor responsible for installing structural steel. Plaintiffs commenced this action on May 9, 2016 to recover damages for the personal injuries sustained by Mr. Pogan in the accident.

At the time of Mr. Pogan's injury, his team was responsible for removing a stair tower from the Construction Site. The tagline holding the stair tower became stuck. Tony Molina, Stonebridge's foreman, instructed Mr. Pogan to climb up a sidewalk bridge and release a tagline that was caught. After releasing the tagline, Mr. Pogan descended the sidewalk bridge and lost his footing causing him to fall approximately 12 to 14 feet (Moving Papers Ex. 3).

Plaintiffs now move for summary judgment on liability on their Labor Law §240[1] claim pursuant to CPLR §3212. The Defendants oppose the motion and cross-move for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint. Plaintiffs oppose the cross-motion.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). The drastic remedy of summary judgment should not be granted when there is any doubt as to the existence of a triable issue of fact or where such an issue is even arguable (Holender v Fred Cammann Productions, 78 AD2d 233, 434 NYS2d 226 [1st Dept. 1980]).

The "public policy [of] protection of workers requires that the [Labor Law] statutes in question be construed liberally to afford the appropriate protections to the worker" (Kosavick v Tishman Constr. Corp. of New York, 50 AD3d 287, 855 NYS2d 433 [1st Dept. 2008]). A plaintiff may not recover under common-law negligence or New York Labor Law §200, §240[1] or §241[6] when the plaintiff was the sole proximate cause of the injuries (Blake v Neighborhood Hous. Servs. of N.Y.C., Inc., 1 NY3d 280, 771 NYS2d 484, 803 NE2d 757 [2003]). "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (Nacewicz v Roman Catholic Church of the Holy Cross, 105 AD3d 402, 963 NYS2d 14 [1st Dept. 2013]).

Labor Law §240[1] imposes absolute liability on owners, contractors and their agents for their failure to provide workers with safety devices that properly protect against elevation-related hazards while they are engaged in certain enumerated activities (Runner v New York Stock Exch., 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009]). A plaintiff is entitled to protection from the gravity-related risk under §240 when he demonstrates: (i) the injury was caused by the inadequacy or absence of a protective device of the kind enumerated in Labor Law §240[1] (*Id*); and (ii) the nature of the task being performed by the plaintiff at the time of his accident presented a foreseeable risk of a gravity-related injury (Narducci v Manhasset Bay Assoc., 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085 [2001]).

"The special hazards covered by Labor Law §240[1] are limited to such specific gravity-related accidents as falling from a height ... (Runner, *supra citing* Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). The protection extends to "all workman on the job" engaged in work limited to: erection, demolition, repairing, or alterations of buildings and structures (Haimes v N.Y. Tel. Co., 46 NY2d 132, 412 NYS2d 863, 385 NE2d 601 [1978]). However, "not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240[1]" (Narducci, *supra*).

Upon a showing that a protected worker was injured as a result of a violation of the statute, absolute liability against the owner, contractor or agent is established as it is not relevant whether Defendant's conduct conformed with the customs or practices, or whether it actually exercised control or supervision over the work that led to the injuries (Zimmer v Chemung Cty. Performing Arts, Inc., 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 [1985]). "Where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law" (Cruz v Turner Constr. Co., 279 AD2d 322, 720 NYS2d 10 [1st Dept. 2001]). "Therefore, even though the [device] itself [is] not structurally defective, as a matter of law it [becomes] defective inasmuch as it [is] clearly inadequate to protect plaintiff from the foreseeable risk of being caused to fall from it while he was performing his job" (*Id*).

Mr. Pogan's fall was the result of an elevation-related risk that Labor Law §240[1] provides protection for. However, issues of fact remain as to whether Mr. Pogan's "own conduct was the sole proximate cause of the accident" (Valente v Lend Lease (US) Constr. LMB, Inc., 29 NY3d 1104, 60 NYS3d 107, 82 NE3d 448 [2017]). With this Court viewing the facts in the light most favorable to the Defendants, Defendants' submitted affidavits that create issues of fact. Matthew Shinske, the site safety manager, stated that the appropriate way to leave the sidewalk bridge was by ladder and that ladders were present at the Construction site (Opposition Papers Ex. A). Stonebridge's own safety director, Bob Spiegel, stated that Mr. Pogan was the "root cause" of his accident due to his failure to adhere to safety protocol (not wearing the harness when descending), and by not using a ladder as a means of egress (*Id* at Ex. B). With the record conflicted on whether Mr. Pogan actually knew that ladders were available and required to use, and whether he knew he was required to wear a harness when ascending and descending the sidewalk bridge, and ultimately unreasonably chose against both decisions, Plaintiffs' motion and Defendants cross-motion on Plaintiffs' §240[1] claim must be denied.

Labor Law §200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v L.A. Wenger Contracting Co., 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [1998]). In a §200 claim, liability is found if defendant exercised control or supervision over the work (Zak v UPS, 262 AD2d 252, 692 NYS2d 374 [1st Dept. 1999]). "Even in the absence of supervision or control by the contractor, the statute applies, *inter alia*, to owners and contractors who either create or have actual or constructive notice of a dangerous condition" (Bradley v Morgan Stanley & Co., Inc., 21 AD3d 866, 800 NYS2d 620 [2nd Dept. 2005]). Constructive notice requires that a defect be visible and apparent and exist for a sufficient length of time prior to the incident to permit the defendant to discover and remedy it (Gordon v Am. Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [1986]).

Plaintiffs withdrew their Labor Law §200 and common law negligence claim against Defendants NYU Langone Medical Center and NYU Hospital Center. This Court will solely analyze Plaintiffs' Labor Law §200 and common law negligence claim against Defendant Turner.

"Labor Law §241[6] imposes a nondelegable duty of reasonable care upon workers and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (Rizzuto, *supra*). "The statute is meant to protect workers engaged in duties connected to the inherently hazardous

work of construction, excavation or demolition" (Nagel v D & R Realty Corp., 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 [2002]).

The Defendants make a prima facie showing that Plaintiffs' §241[6], §200 and common-law negligence claims must be dismissed. Mr. Pogan was supervised solely by Mr. Molina, the Stonebridge Foreman, and only used Stonebridge's equipment during the Construction Project. Mr. Pogan conceded the sidewalk bridge he was descending was not defective (Moving Papers Ex. 3). None of the Industrial Code regulations Plaintiff relies on for his §241[6] claim provide a basis for the imposition of liability. They are either too broad or inapplicable to the facts at hand (*see* Gasques v State of N.Y., 15 NY3d 869, 910 NYS2d 415, 937 NE2d 79 [2010]; Varona v Brooks Shopping Ctrs. LLC, 151 AD3d 459, 56 NYS3d 87 [1st Dept. 2017]; Morales v Spring Scaffolding, Inc., 24 AD3d 42, 802 NYS2d 41 [1st Dept. 2005]). As to Plaintiffs' Labor Law §200 and common-law negligence claims, the record establishes that Defendant Turner did not create any dangerous or defective condition contributing to Mr. Pogan's fall since his fall was the result of him losing his balance, and not due to any defect with the sidewalk bridge. Additionally, Plaintiffs did not raise any defense to dismissal of their §241[6] claim in their opposition papers, as such it is abandoned (Perez v Folio House, Inc., 123 AD3d 519, 999 NYS2d 29 [1st Dept. 2014] *citing* Gary v Flair Beverage Corp., 60 AD3d 413, 875 NYS2d 4 [1st Dept. 2009]).

Accordingly, it is ORDERED, that Plaintiffs' motion for summary judgment on liability on his Labor Law §240[1] claim against Defendants pursuant to CPLR §3212 is denied, and it is further,

ORDERED, that the Defendants' cross-motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiffs' Complaint, is granted to the extent that Plaintiffs' Labor Law §241[6], §200 and common-law negligence claims are dismissed, and it is further,

ORDERED, that Plaintiffs' Labor Law §241[6], §200 and common-law negligence causes of action are hereby severed and dismissed against the Defendants, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: April 5, 2018

Manuel J. Mendez
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE